

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

SANT SINGH V/s. Smt. BHAGWATI &Ors.

S.B.CIVIL SECOND APPEAL No.52 of 1984

Date of judgment : 24th November, 2006

REPORTABLE

PRESENT

HON'BLE SHRI N P GUPTA, J.

Mr. R.R. Nagori, for the appellant.

Mr. R.K. Thanvi, for the respondent.

BY THE COURT:

This second appeal has been filed by the defendant against the decree for eviction from the suit shop passed by both the learned courts below.

The facts of the case are, that on 14.9.1974, the plaintiffs, who are legal representatives of the deceased landlord Mangha Ram, filed the present suit alleging interalia, that the defendant had taken the shop in question on rent from him on 1.8.1969 at a monthly rent of Rs. 80/-, for carrying on his own business, and stipulating to pay electricity charges according to the meter reading, and to pay meter rent. Boundaries of the shop are given in

the plaint. Mangha Ram is said to have expired on 5.5.1970. According to the plaintiff, the defendant has not paid rent after 31.7.1973, and thus has committed default in payment of rent. Then, in para-5 it was alleged, that the defendant has sublet the suit shop to Trilok Singh without permission of the plaintiff, and therefore, also he is liable to eviction. A notice was given on 11.3.1974, but to no good. Thus, the suit has been filed for eviction, arrears of rent, electricity charges, and the meter rent etc.

The defendant has filed his written statement on 23.1.1975. It was pleaded by the defendant, that the shop was taken on rent by the defendants' father Jagan Singh from Kanwar Raji, for his own and his sons' business, way back in the year 1950, at a monthly rent of Rs. 10/-, and when Mangha Ram purchased the shop, he threatened for eviction, and got the rent enhanced from time to time, in which process it was increased to Rs. 60/- in the year 1968. Then, in 1969 it was increased to Rs. 80/-. Thus, the defendant and his father were jointly carrying on business in the shop, and are carrying on. It was also pleaded that the shop is very small, having been provided at the space of staircase, and measures 3 x 20 ft. Regarding default, it was pleaded, that the rent was offered time and again but with intention to enhance the rent it was not received, and even money orders were refused. Then, the pleading of subletting was denied, and it was pleaded that the

defendant had not sublet the shop to anyone, and the plaintiff is not entitled to any decree for eviction. According to the defendant the notice determining the tenancy was replied, and was shown to be invalid. Then, other claims of the plaintiff were disputed, and it was contended that the plaintiff cannot recover any rent beyond the permissible standard rent.

In additional pleas it was pleaded, that since before purchase of the shop by Mangha Ram, the defendant and his father are tenant, and since 1950 itself, Jagan Singh, the defendant, and his brothers are carrying on their business in the shop. Thus, the shop has not been sublet. Then, facts were pleaded about the standard rent of the shop to be Rs. 10/-, and ultimately it was prayed that the suit be dismissed, and standard rent be determined.

Learned trial court framed as many as seven issues. Issue no. 1 was, as to whether the defendant is not a defaulter, placing burden on the defendant. Then, issue no. 2 was as to whether the defendant has sublet the shop. Then, the issue no. 3 was about plaintiff's entitlement to get rent at the rate of Rs. 80/- per month. Then, issue no. 4 related to meter rent, and electricity charges, issue no. 5 comprehended the question of validity of notice, issue no. 6 was about standard rent, and issue no. 7 related to relief.

In trial the parties produced oral evidence as well as some documentary evidence. Initially the rent was determined, and it was paid.

Learned trial court after completing the trial held, that the defendant has paid the rent on the first date of hearing, and has thereafter been paying rent regularly, therefore, he is not a defaulter. Then, the next issue, being issue no. 2, was decided against the defendant. While deciding this issue it was considered, that an important piece of evidence is rent note Ex.-1, which has been proved by Prakash Kurani, and Harish. It was also considered that Jagan Singh, while in the witness box has admitted that this rent note was executed by the defendant. Then, it was considered, that it was on 2.9.1969, that Santok Singh took the shop on rent from Mangha Ram, for carrying on his own business, while the case of the defendant is, that he took the shop from his father Jagan Singh, but then when rent note was executed in presence of Jagan Singh, it has to be assumed that Jagan Singh surrendered his tenancy, and permitted new tenancy to commence in favour of Santok Singh. It was also considered, that as defendant's evidence states, that the rent note was executed in the name of Santok Singh, otherwise the plaintiff wanted the shop to be evicted. Even from this it is clear, that the plaintiff did not want the joint tenancy

in favour of the defendant and his father, rather he wanted to give shop to Santok Singh only. Then, it was considered that it is not the defendant's case that he and his father constitutes Joint Hindu Family, and therefore, it cannot be said that the shop has been given to Trilok Singh as a member of the family of the tenant. Then, the evidence of Anand Bihari Lal Mathur has been considered, who has proved various documents of registration, license etc. under Rajasthan Shops and Commercial Establishment Act, which proves that the name of the shop in question has been changed to Sardar Radio Service since 1973 vide Ex.-4, proprietor whereof is Trilok Singh, and on the reverse side thereof it is written by Trilok Singh himself, that he has started the shop some two years ago, and before that he had no shop. In the opinion of the learned trial court, this recital knocks down the very bottom of the defendant's case. Then, it has been considered that Trilok Singh has not been produced in evidence. Then, the receipts Ex. A-1 to 3, 5 to 7, 11, 13, and 14 have been considered, and it has been held, that they all relate to the period, prior to commencement of the tenancy, and after the new rent note Ex.1 has been executed, no receipt was issued in the name of Jagan Singh. With these conclusions it was held, that the defendant has sublet the shop to his brother, and thus he has parted with the possession of the shop in favour of his brother, and thus the issue has been decided against the defendant. Deciding issue no. 3 it was held, that the

plaintiff is entitled to receive the rent @ Rs. 80/- per month. Then, issue no. 4 was decided in favour of the plaintiff. Then, deciding issue no. 5 notice was found to be valid. Then, issue no. 6 was decided against the defendant, holding that the very shape of the shop had been changed. In the result, the suit for eviction was decreed, along with the arrears of rent, and electricity charges, and meter rent.

In appeal, the learned lower Appellate Court upheld the findings on all the issues. Regarding issue no.2 it was considered, that from the evidence of the plaintiff, which has come on record, it is proved, that Santok Singh has sublet the shop to Trilok Singh, and has started the new shop near Minerva Cinema Building, in the name and style of Light and Radio Service, and that, earlier Santok Singh was sitting on the shop in question, while he was carrying on business in the name of Radio Service, but now Santok Singh does not sit, and instead Trilok Singh only sits. Then, the learned lower Appellate Court also considered Ex.5, which was submitted for weekly holiday of the shop, wherein Trilok has signed as proprietor, and also considered Ex.7 being the Registration Certificate regarding defendant's shop near Minerva Building, in the name and style of Light and Radio Service. The statement of Anand Bihari Lal was considered, and it was also considered that the defendant Sant Singh was carrying on business in

the name and style of Light and Radio Service, and it was also considered, that the defendant Santok Singh has admitted in cross-examination, that on the suit shop his brother Trilok Singh sits, and that his brother has got his name entered in the Commercial Establishment Office, and that he himself sits on another shop, being Light and Radio Service, near Minerva Building since 1974, and that this shop is registered in the year 1973. Thus, it was considered to be very material admission on the side of the defendant, about his not sitting on the shop in question, and about his brother sitting on the shop in question, and about effecting the registration with respect to the suit shop. Thus, it was found, that the defendant has parted with the possession of the shop in favour of brother, Trilok Singh. Then, it was considered that the case of the defendant is, that Trilok Singh sits in his shop with his permission, but then the defendant does not know about profit and loss of the shop, or about payment of any electricity charges etc., which shows that he has nothing to do with the shop, rather he has set up his own new business. Then, the factum of earlier tenancy was also considered, and it was considered, that admittedly defendant had taken the shop from Mangha Ram on 1.8.1969, vide Ex.-1, which rent note is duly proved. It was considered that even according to Jagan Singh, he was carrying on business in the name of Sardar Electric Store, and after execution of the rent note in favour of Sant

Singh, the name of the shop was changed to Sardar Radio Service, and new tenancy has come into existence between Mangha Ram and the defendant, and it cannot be believed that the shop is in tenancy of Jagan Singh. It was also disbelieved, that Jagan Singh has Joint Hindu Family, as Jagan Singh himself admits, that Sant Singh runs the Radio Light shop near Minerva Building, and Trilok Singh had gone to Jaipur, and both these sons live separately from him. Thus, it was found, that there is ample reliable evidence on record, on the side of the plaintiff, to show that the suit shop was in tenancy of Sant Singh, who has parted with its possession to Trilok Singh without permission of landlord. Then, it was also considered that the defendant's witnesses have tried to prove, that the defendant had told the plaintiff, to receive the rent from Trilok Singh, but then there is no evidence whatever on record, that the rent was ever received by the plaintiff from Trilok Singh. It was concluded, that the defendant has retained no possession of the shop in question, and has started independent business near Minerva Cinema, and has no connection with the suit shop, and under the Act Trilok Singh is not a tenant, but is a sub tenant. Thus, it was found, that the plaintiff has successfully proved, that the defendant has parted with the possession of the premises in favour of Trilok Singh, without permission of the landlord, or has given it on rent to other persons, or has otherwise parted with possession. Learned lower Appellate Court also

placed reliance on the judgment of this Court, in Bhagwat Prasad Vs. Dwarka Prasad, reported in 1969 WLN-351.

The present appeal was filed on 17.4.1984, and was admitted on 1.4.1985, by framing following substantial question of law:-

"Whether the finding arrived at by the first appellate court that the defendant had either assigned or sub-let or otherwise parted with possession of the premises in dispute without the permission of the landlord is proper and whether the same is sufficient to pass a decree for eviction within the meaning of Section 13(1) (e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950?"

Arguing, the appeal it was contended by the learned counsel for the appellant, that the learned lower Appellate court has based its findings on the judgment of this Court in Bhagwat Prasad Vs. Dwarka Prasad, reported in 1969 WLN-351, while that judgment has been over-ruled by the Division Bench in, Amir Ahmed Vs. Yusuf, reported in 1985(1) WLN-550, it was then submitted, that there is no finding of the learned lower Appellate court about the tenant having sublet the premises, as contemplated by Section 13(1) (e) of the Act, and to Trilok Singh, as pleaded in the plaint, inasmuch as the finding recorded at page-9 is, that the plaintiff has been able to establish, that the defendant tenant has delivered possession of the premises to other person Trilok Singh without permission of

the landlord, or has sublet it to other person, or has otherwise relinquished the possession; which according to the learned counsel, is not a finding of subletting. It was then submitted, that the pleading contained in this regard in the plaint are also not sufficient, inasmuch as all that has been pleaded is in para-5 of the plaint, wherein it has been pleaded that the defendant has sublet the suit shop without plaintiff's permission to Trilok Singh, and therefore, the plaintiff is entitled to decree for eviction, while according to the learned counsel this pleading merely amounts to pleading law, and the necessary ingredients of subletting, as might have been the case of the plaintiff, and which was required to be pleaded, have not been pleaded, like that the tenant has parted with the possession exclusively in favour of the subtenant, inasmuch as that the tenant has retained no control over the premises, and that the sub tenant has absolute right of possession over the property i.e. he has the right to include some-body-else so far the tenant is concerned, and has also a right to exclude any other person from entering into possession. Likewise, the another thing required to be pleaded was, that there is a relationship of lesser and lessee between the tenant and the subtenant, and that such relationship is for consideration. Since both these necessary ingredients, which are factual aspect of the matter have not been pleaded, therefore, the Court even did not acquire any jurisdiction to pass a decree on the ground

of subletting. Then, another submission that was made was, that the defendant and Trilok Singh both are real brothers, and as has come on record, that the premises were originally let out to Jagan Singh, who is the father of the defendant and Trilok Singh as well, the rent was being paid by Jagan Singh, and simply because his one son continues to carry on business, or other son carries on business, is hardly sufficient to make out any case of subletting. It was pleaded in the written statement, that Jagan Singh is the tenant in the premises since 1950, and since then, Jagan Singh, the defendant, and his brothers have been carrying on business in the suit premises, and thus there is no subletting. Assailing the findings of the learned courts below, it was contended, that simply because a fresh rent note was executed by Trilok Singh, it cannot be said that the tenancy of Jagan Singh at all came to an end. Reliance in this regard was placed on the judgment of Hon'ble the Supreme Court, in T.K. Lathika Vs. Seth Karsandas Jamnadas, reported in (1999)6 SCC-632, wherein it has been held, that mere alteration, or improvement, or even impairment of the former relationship, would not ipso facto amount to implied surrender, and it has to be ascertained on the terms of the new relationship, vis-à-vis the erstwhile demise, and then judged, as to whether there was termination of the old jural relationship by implication, and therefore, since Sant Singh and Trilok Singh are sons of Jagan Singh, no case of subletting is at

all made out. It was also submitted that apart from the fact that there is no pleading, even in evidence there is not an iota of evidence to show, that the alleged induction of Trilok Singh by Sant Singh defendant, is for consideration, or that there is any relationship of landlord and tenant between Sant Singh and Trilok Singh. Then, learned counsel referred to me, rather read to me Section 13(1)(e), and also referred to rent receipts, being Ex. A-1 to A-15. Then, referring to Ex.A-6 and A-7 and A-12 it was submitted, that these receipts show, that rent was received by the landlord from Jagan Singh, and that Sant Singh was working with his father Jagan Singh. He also referred to the statement of P.W.2, who had admitted in cross examination, that Sant Singh, Trilok Singh and Jagan Singh were working on the shop, since even before the execution of the rent note. Likewise, he also referred to the statement of P.W.3, who has admitted in cross examination, that Jagan Singh continues to sit on suit shop even now. Then, learned counsel referred to the statement of P.W.1, who has deposed in cross-examination, that Sant Singh told him to take rent from Trilok Singh, which clearly shows, that there was no case of subletting, inasmuch as if it were the case of subletting, then Trilok Singh would have paid rent to Sant Singh, who in turn may have paid it to landlord. Likewise on the question of subletting, learned counsel also referred to other part of the statement of this witness, wherein this witness has

deposed to be not knowing Jagan Singh, who was present in the Court, while as a matter of fact, admittedly he was tenant in the shop since before the shop was purchased by the plaintiff. Thus, according to the learned counsel even from the evidence of the plaintiff the subletting is not proved. The next submission made was, that even if it were to be assumed, that the finding recorded by the learned lower Appellate court is a finding about the appellant's parting with the possession of the suit premises, still no such finding could be recorded in absence of any pleading in this regard. Long drawn submissions were made on the aspect of variance between pleading and proof, and reference was made to the judgment of Privy Council, in *Adusumilli Gopalkrishnayya Garu Vs. Province of Madras*, reported in AIR 1947 Privy Council-132, *M/s Trojan & Co. Vs. R.M.N.N. Nagappa Chettiar*, reported in AIR 1953 Supp. Court-235, *Vinod Kumar Arora Vs. Smt. Surjit Kaur* reported in AIR 1987 SC-2179, *Manna Lal Vs. Moolchand & Anr.* reported in (1986)3 Judicial Surveyor-371.

Arguing on the question of parting with possession, learned counsel relied upon the judgment of Delhi High Court, in *Hazarilal Vs. Gian Ram*, reported in 1972 RCR-74, which has been relied upon, and followed, by the Division Bench of this Court in *Amir Ahmed's* case. It was submitted that in *Hazarilal's* case it was laid down, that the three expressions used in Section 14(1)(d) of the

Delhi Act viz. "Sub let" "assigned" and "otherwise parted with the possession" deal with different concepts, and apply to different circumstances, inasmuch as, in case of subletting there should exist the relationship of landlord and tenant as between the tenant and his sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sub-let. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression 'parted with the possession' undoubtedly postulates the parting with the legal possession. And that, parting with possession means giving possession to persons other than those to whom possession has been given by the lessee and "the parting with possession" must have been by the tenant. The mere user by other persons is not parting with possession as long as the tenant retains the legal possession himself or, in other words, there must be vesting of possession by the tenant in another person by divesting himself of not only physical possession, but also of the right to possession. So long as the tenant retains the right to claim possession from his guest, who does not pay him any rent or other consideration it would not be possible to say that tenant has parted with possession, even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenanted premises. If the tenant has a right to

disturb the possession of his guest at any time, he cannot be said to have parted with the possession of the tenanted premises. The mere fact that the tenant himself is not in physical possession of the tenanted premises for any period of time, would not amount to parting with the possession, as long as, during his absence, tenant has a right to return to the premises, and be in possession thereof. A mere privilege of license to use the whole or a part of the demised premises which privilege or license can be terminated at the sweet will and pleasure of tenant at any time would not amount to "parting with possession". The divestment or abandonment of the right to possession is necessary in order to invoke the clause of "parting with possession". Thus, it was contended, that for making out "parting with possession", legal possession should be parted with, i.e. possession should be given to other person, and if the sub tenant is merely allowed to use, so long as tenant retains possession it cannot be subletting, rather tenant must have divested himself of the possession, viz. that he must have retained no right to get back the possession. It was maintained that in the present case there is no plea about the defendant having no right to get back the possession. Then reliance was placed on the judgment of Hon'ble the Supreme Court, in Resham Singh Vs. Raghbir Singh & Anr. reported in (1999) 7 SCC-263, specially para-7, to contend, that for subletting there should be exclusive possession of the subtenant, relationship of

landlord and tenant must have existed between the tenant and subtenant, and there should be parting with possession. Then, reliance was placed on the judgment, in Delhi Stationers & Printers Vs. Rajendra Kumar, reported in 1990 (1) RCR-491, to contend, that in order to make out subletting there should be consideration, for parting with possession in favour of subtenant, and mere occupation of the subtenant is not enough. Then reliance was also placed on judgment of Hon'ble the Supreme Court, in Jagan Nath Vs. Chander Bhan & Ors., reported in (1988)3 SCC-57, so also in Dipak Banerjee Vs. Lilabati Chakraborty, reported in (1987) 4 SCC-161, to contend that consideration of parting with possession is essential, the sub tenant should be in exclusive possession, and that the tenant should not retain any control in the possession. Then, reliance was placed on Benjamin Premanand Rawade Vs. Anil Joseph Rawade, reported in (1998)9 SCC-688, and Dev Kumar Vs. Swaran Lata, reported in (1996) 1 SCC-25, to contend that there should be relationship of landlord and tenant between the tenant and subtenant, i.e. there should be transfer of actual possession, and it should be for consideration. According to the learned counsel all these are the factual aspects, which are required to be pleaded, and proved, and if they are established, then the conclusion is of premises having been sublet. It was then contended, that even earlier to the execution of the rent note, the defendant Sant Singh was paying rent, and therefore, by mere execution of the

fresh rent note it cannot be inferred, that there was implied surrender of old tenancy. This argument was actually repeated, as it was made in the opening part, by taking support from the judgment Hon'ble the Supreme Court in T.K. Lathika's case. Then, the judgment of this Court in Hardev Vs. Jaidev reported in 2000(1) RLW (Raj.)-407, was also relied upon, to contend that pecuniary benefit to the tenant is a must to make out a case of subletting, and thus it was contended, that the substantial question is required to be answered in favour of the appellant, and the impugned decrees are liable to be set aside.

Learned counsel for the respondent on the other hand supported the impugned judgments. Reading para-2 of the plaint and written statement, it was contended that the plaintiff's specific case was that the defendant has taken premises for carrying on business by himself, and the case of the defendant in the written statement is, that the defendant and his father were jointly carrying on business, and are continuing to carry on business jointly. Then, in additional pleas again it was pleaded, that the defendant, his father and brother are continuing to carry on their business in suit shop. However, it was maintained that there is no pleading about the defendant himself being continuing to work in the suit premises, and then there is no pleading to show as to what, after all was, the purpose of executing the fresh rent note. Then, reference was made

to para-13 of the written statement, where it was pleaded that the defendant was tenant of Mangha Ram, and notice by one of the legal representatives alone is not valid. Thus, even according to the defendant, it was defendant who was the tenant. Then, learned counsel read to me the entire evidence of the parties, and referred to the statement of P.W.1 and 2, and it was contended, that it was not put to any of these witnesses, that the defendant is carrying on business in the suit shop, or that the defendant is in possession of the suit shop, rather even the plea, that the shop has not been sublet was not put in cross-examination, and to P.W.2 all that was asked was, that at the time of execution of the rent note all the three were there. Thus, the defendant did not put his case to the plaintiff or his witness in cross examination. Then, the learned counsel referred to para-19 of the memo of appeal, filed before the learned lower Appellate Court to contend, that even therein it was not the case, that the defendant is continuing, or is having possession over the suit shop.

Then, controverting the argument of the learned counsel for the appellant about absence of pleading, or the pleading being not sufficient, learned counsel relied upon the judgment of Hon'ble the Supreme Court, in Virendra Kashinath Ravat Vs. Vinayak N. Joshi, reported in 1999(1) CCC-392, specially para-12, 14, 16, 17 and 18, and also relied upon the judgment of this Court, in Govind Prasad

Vs. Vijay Singh, reported in 2006(2) DNJ(Raj.)-2017, specially para 3, 16, 17 and 26, and contended, that the pleading as contained in para-5 of the plaint is sufficient, and that there is no variance between pleading and proof, and that no further particulars were required to be pleaded. Then, other judgments of this Court, in Narayan Lal Vs. Nana Lal, reported in 1978 WLN(UC)-232, and Narasa Ram Vs.Smt. Babli Bai, reported in 1983 RLW-591 were relied upon. Learned counsel also relied upon judgment of Hon'ble the Supreme court, in Nagubai Ammal Vs. B.Shama Rao, reported in AIR 1956 SC-593, specially para-11, to contend that in certain circumstances absence of a specific pleading on a particular question may be a mere irregularity, which may result in no prejudice to the parties. Moreover when the parties went to the trial with full knowledge about the question in issue, and had ample opportunity to adduce their evidence thereon, and had fully availed themselves of the opportunity. Then, the judgment of Punjab and Haryana High Court, in Sher Singh Vs. Chandu Lal, reported in 2003(1) RCR-440, was relied upon to contend that in the present case subletting is made out, as in that case the premises were let out to Sher Singh, who was alleged to have sublet the premises to Shiv Kumar, without consent of the landlord. It was found, that Shiv Kumar was son of Sher Singh, and the statement of Sher Singh was considered, who had deposed that Shiv Kumar was having joint mess and business with him, and that he also

used to sit in the demised premises along with his son, and that he met with an accident in 1972, and was joint with his sons except Naranjan, the allegation of subletting was denied. Then in cross-examination he had admitted, that his sons had separate ration cards, including that of Shiv Kumar, and that his son Roshan lal was running a shop, where he had installed a Chakki for grinding Haldi and spices. Then, evidence of Shiv Kumar was also referred to, who admitted that all the brothers did not hand over their income to their father, and they had got separate ration cards, which circumstances was considered enough to conclude, that sons were not members of joint Hindu family, but they are separate. Then, it was considered that there could be no direct evidence to show that Shiv Kumar was paying so much rent to his father Sher Singh, as it had to be inferred from the circumstances of the case, and it was considered that father and son were living separately, had separate ration card, and were running separate business. In these circumstances, relying on previous judgments of that Court, it was found, that it is conclusively proved that Sher Singh had sublet the premises to Shiv Kumar, the son, who was running business of preparation of tea, and Sher Singh is not in possession of the same. Then, another judgment of Punjab and Haryana High Court in Rajinder Singh Vs. Joginder Singh, reported in 2003(1) RCR-562, was relied upon, which again was a case of subletting between the father and son, and it was considered that the ledger

produced, showing keeping of account of two shops jointly, was found to be manufactured evidence, as in the returns filed with the Income Tax Department, the respondent no. 2 (sub tenant) was shown to be exclusive owner of M/s. Supreme Dry Cleaner, and thus it was concluded, that the demised premises are in exclusive possession of the sub tenant, and from that it was also concluded, that it means that the tenant has abandoned his right of possession in the demised premises in favour of sub tenant. According to the learned counsel, circumstances of the present case are identical, and on this basis subletting has rightly been found by the learned courts below, and in any case is required to be concluded by this Court against the appellant. Then, another judgment of Kerala High Court, in Damodara Pai Vs. Challamma, reported in 2003(1) RCR-418, was also relied upon, where the allegation was of subletting to brother, as in the present case, and therein relying upon the judgment of Hon'ble the Supreme Court, in M/s. Bharat Sales Ltd. Vs. Life Insurance Corporation of India, reported in AIR 1998 SC-1240, it was concluded, that the respondent as well as her children are not in occupation of the building, rather second respondent is admittedly in occupation of the premises, and it was found, that there is a clandestine arrangement between the 1st respondent and the 2nd respondent, because of which the former had parted with possession in favour of second respondent. Likewise relying upon the judgment of Hon'ble

the Supreme Court, in S.A. Vengadamma Vs. Jitendra P Vora, reported in (1997) 11 SCC-334, it was held that when the tenant respondent had vacated the premises and had gone to live elsewhere, it does not lie in his mouth to say that in leaving his brother behind in the tenanted premises, he has left behind a member of his family, unless, of course, he could have successfully pleaded that the tenancy at the inception was obtained by a joint family, in case before Kerala High Court it was considered that the tenant's wife and children are no more in occupation of the building as they have permanently settled at Punnapra, Alleppey District, and that the tenancy agreement was with the husband, and thus the second respondent was found to be sub tenant. Hon'ble the Supreme Court in M/s. Bharat Sales Ltd.'s case, referred to above, has held as under:-

"Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let-out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or

agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the Court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sublet."

And thus, it was contended that the law does not require any payment to be proved by affirmative evidence, and it is permitted to the Court to draw inference upon the facts proved. Then, the judgment of Madras High Court, in M.V. Swami Vs. Ameer Basha reported in 1985(2) RCR-412 was relied upon, wherein sign board of type writing institute in the name of sub tenant was there, and it was found to be a case of subletting. Then reliance was placed on the judgment of Punjab & Haryana High Court, in Mrs. Sushma Malhotra Vs. Prem Nath reported in 1986(1) RCR-347, where the tenant passed over the exclusive possession and control of a part of the demised premises to sub tenants, making wooden cabins having independent doors under separate lock and key, the sub tenant had obtained State and Central Sales Tax Certificate after giving their place of business on the address of the demised premises, and it was found to

be proved that the premises have been sublet. Then, the judgment of Hon'ble the Supreme Court in M/s. Bharat Sales Ltd.'s case was also relied upon. Reliance was also placed on the judgment of this Court in Krishanchand Kapur Vs. Kishanchand Mehra reported in 1970 RC-133, wherein it was held that more often than not, it is difficult for a landlord to give direct evidence of sub tenancy between a tenant in chief and the alleged sub tenant because this is matter specially within the knowledge of the tenant in chief and the alleged sub tenant and therefore, the presumption can be drawn under Section 13(2), and on this basis it was contended that the learned counsel for the appellant is not correct when he insists on direct evidence of existence of consideration for parting with possession, as a necessary ingredient of subletting. Then, the judgment of Hon'ble the Supreme Court, in K. Ganesh Shet(M/s.) Vs. Sri A.K. Jayarama Sheka, reported in 2004 CJ(Rent Control)-469 was relied, and lastly the judgment of this Court in Mohan Kumar Vs. Nand Kishore reported in 1989(1) RLW-198 was relied upon, to contend that subletting is a question of fact, and therefore, do not require any interference.

In rejoinder the learned counsel for the appellant relied upon judgment of this Court, in Phool Chand Vs. Dr. Gulab Chand reported in 1999(3) WLC (Raj.)-189, to contend that there has to be a specific plea, as submitted in the original arguments, it was also contended that the

plaintiff has simply pleaded law, and not pleaded factual aspects, or ingredients, constituting the ground. Repeating the argument, it was contended that the relationship of landlord and tenant between tenant and sub tenant, and handing over exclusive possession to the sub tenant is a sine qua non, which must be pleaded and proved, and in absence of the same, no ground of subletting can be said to be made out, and from that stand point subletting is a question of law. Then, learned counsel tried to also rely upon judgment of Hon'ble the Supreme Court, in Roshan Lal Vs. Madan Lal, reported in AIR 1975 SC-2130, and also tried to distinguish some of the judgments cited by the learned counsel for the respondent.

I have considered the submissions. I have gone through the record closely, and have also gone through the various judgments cited at the bar.

At the outset it may be observed, that on various factual aspects there is no controversy between the parties. It is a different story as to what is the consequence thereof. I shall refer to different such aspects from time to time. To start with it may be observed, that it is not in dispute as to what is the pleading of the parties in regard to subletting, and they are as contained in para-5 of the plaint, and corresponding para-5 and 11 of the written statement. The pleading

obviously is only in para-5 of the plaint, which is as under:-

“(५) यह है कि प्रतिवादी ने दूकान मुतनाजा श्री त्रिलोक सिंह को वादीगण की इजाजत के बिना सबलेट करदी है तथा इस कारण भी वादीगण प्रतिवादी को बेदखल करने का अधिकारी है।”

The pleading in paras 5 and 11 of the written statement is as under:-

“5- पद नं.5 अर्जीदावा गलत है व स्वीकार नहीं है । प्रतिवादी ने दुकान मुतदाविया किसी को भी सबलेट नहीं किया है । इस कारण वादीगण प्रतिवादी को बेदखल करने के अधिकारी नहीं है ।

11- यह कि दुकान मुतदाविया श्री मंधाराम ने खरीद किया उनसे पहले ही प्रतिवादी व उनके पिताजी श्री जगन्नसिंह सन 1950 से किरायेदार है व 1950 से ही श्री जगन्नसिंह, प्रतिवादी व उनके भाई उक्त दुकान मे अपना कार्य करते आये है । व इस प्रकार प्रतिवादी ने दुकान मुतदाविया को सबलेट नहीं किया है ।”

In other words it is not in dispute, that it has not been pleaded that the defendant has parted with possession in favour of Trilok Singh, exclusive possession has been handed over to Trilok Singh, giving him right to exclude others, nor is there any specific pleading about this having been done with consideration, i.e. about there being existence of any relationship of landlord and tenant between the defendant and Trilok Singh. As noticed above, on the basis of this pleading a big contention has been

raised about the plaintiff being not entitled to prove the facts proved, about the defendant carrying on business near Minerva Building, and Trilok Singh carrying on business in the suit shop, the two businesses having independent registration with the Shops and Commercial Establishment Authority, and one having nothing to do with the other, and so on, on the ground of it tantamounting to variance between pleading and proof, and number of judgments have been cited by the learned counsel for the appellant, in regard to abstract legal proposition of variance between pleading and proof.

In Adusumilli Gopalkrishnayya's case the allegation in the plaint was, that the plaintiff is entitled to get free supply of water for wet crop raised on 177 acres, irrespective of the nature of the crops, and claimed to recover the amount, which he said, had been illegally charged, and the principle was recapitulated that material facts should be pleaded, and this rule is not mere technicality, rather omission to observe it deprives pleadings of most of their value, and may increase the difficulty of the Court's task of ascertaining the rights of the parties. Coming to the details, it was held that the plaintiff made two allegations of fact about the appellant's requirement in 1934, the first was that the variety of sugar cane which he cultivated did not require as much water as an ordinary paddy crop would require, and

it was proved at the trial, and is now conceded, that the sugar cane crop would certainly not require more water, in total annual amount, than would have been needed for a paddy crop. However, from the entire reading of the judgment it transpires, that Privy Council did consider the case, including evidence, on merits and did not find the plaintiff's case proved. Significantly the case was not thrown out for want of any pleading, or any evidence being contrary to the pleadings. So far abstract legal principle is concerned, that does not admit any doubt, but then consequence in the present case shall be examined later. Then, Messers Trojan's case also laid down, that the decision of a case cannot be based on grounds outside the pleadings of the parties, and it is the case pleaded that has to be found, and that without amendment of the plaint the Court was not entitled to grant the relief not asked for. Again abstract legal principle does not admit of any doubt or dispute. Then, coming to Vinod Kumar's case, therein it was held, that the pleadings of the parties form the foundation of their case, and it is not open to them to give up the case set out in the pleadings and propound a new and different case. This abstract legal proposition also admits of no doubt. Significantly in that case a suit for eviction was filed on the ground of inconsistent user of the premises, inasmuch as according to the plaintiff the premises were let out for residential purpose, while the defendant was using it for commercial purpose, viz. for

running a clinic, and in the written statement the plea taken was, that the premises were taken for the purpose of residence and for running his clinic therein, and that respondent is having his residence and clinic in the premises in dispute, and he is using the premises for the said purpose as such. As against this when the defendant entered the witness box, he gave up this case, and propounded a different case, that the premises has been taken on lease only for non residential purpose. It was considered, that the perceptible manner, in which the defendant had shifted his stand, has escaped the notice of the authorities below. In that background the above observations were made by Hon'ble the Supreme Court. Obviously this case is on different facts, as compared to the case in hand. Then, in Manna Lal's case, the plaintiff sought to rest his claim on having become owner by way of adverse possession, but then this was never his case in the plaint, rather case in the plaint was about property having been constructed by the husband of Kesar Bai, who had a daughter Ramjanaki, and the plaintiffs were sons of Ramjanaki, and the case set up was that since Kesar Bai had no sons, she bequeathed the house to the plaintiff respondents by registered Will, and that the plaintiffs came in possession of the suit premises on the death of Kesar Bai, and since then they have been in possession of the suit premises. Obviously, thus the case pleaded, and sought to be established, was radically different. The

stand of adverse possession and acquiring title on that basis is a pure question of fact. Obviously when the plaintiff comes with the story of claiming under a Will, the defendant would not be expected to controvert the stand of plaintiff to be likely to claim on the basis of adverse possession. Thus, the case is clearly distinguishable on facts.

The question then is as to whether there is any variance between pleading or proof, or that the facts proved by the plaintiff are beyond the pleadings, so as to require to be excluded from consideration. This is an aspect which is required to be examined on the anvil of various judgments cited at the Bar, on either side. The fact does remain, that the pleadings are as recapitulated above. I may notice and observe here that the other cases cited by the learned counsel for the appellant are, about the requirements to be proved, to make out a case of subletting, and by referring to those judgments it was sought to be contended, that the requirements required to be proved being questions of fact, are required to be pleaded, and merely pleading the premises to have been sublet without plaintiff's permission on account of which the plaintiff is entitled to decree for eviction, is not enough. As against which the learned counsel for the respondent has cited number of judgments where the Courts, including Hon'ble the Supreme Court, has precisely

considered the pleading, with a view to examine, as to whether that pleading is sufficient to make out a plea of subletting, and therefore, I stand better advised to consider the case from this stand point.

Learned counsel for the appellant in this regard referred to the judgment of this Court in Phool Chand's, case wherein it was held by learned Single Judge of this Court, that in order to make out a ground of default as contained in Section 13(1) (a) of the Act, mere pleading that the defendant has never paid rent in time or has paid rent only upto September, 1974, and has not paid thereafter despite demands is not sufficient pleading of default, inasmuch as in order to maintain a suit on the cause of action of default the landlord was required to plead the material fact, that tenant neither tendered the rent, nor paid it, and absence of averment of non tender of rent was held to be fatal to the landlord. Learned counsel for the respondent, on the other hand, invited my attention to earlier judgment of this Court, in Shyam Sunder Vs. Moda Ram, reported in 1981 RLW-178, wherein in para-8 it was held, that it is true that in para 4(kh) the ground is not stated in the very words as found mentioned in clause (a) of sub-sec. (1) of Section 13, but it is not essential to use the same phraseology. It was held, that the pleading has to be construed in its essence, substance, and spirit. The plea taken was that the defendant has allowed the rent

of seven months to fall in arrears, so he is a defaulter, while the reply was, that the defendant is not a defaulter, because he had been continuously offering the rent to the plaintiff but the plaintiff did not accept the rent deliberately with a view to make him a defaulter. It was also pleaded by the defendant that many times rent was offered to him but the plaintiff refused, and so money order was sent, but he did not accept the same. On these pleadings the contention raised, that in the absence of statement that the rent was not offered to him, suit cannot be maintained, was not accepted. Thus, the two Single Bench Judgments take diametrically opposite view, and admittedly Phool Chand's case does not notice Shyam Sunder's case. Learned counsel for the respondent also invited my attention to Narasa Ram's case, wherein a contention was raised, that in order to comply with the conditions specified in Section 13(1)(a) of the Act, the plaintiff should have alleged, that the defendant had neither paid nor tendered rent of more than six months preceding the date of the filing of the suit, and it had not been pleaded in the plaint in so many words, that the defendant had failed to tender rent for a period of more than six months, although it was pleaded that the defendant failed to make payment of rent for a period of more than six months prior to the filing of the suit. However, it was pleaded that the defendant had become a defaulter, and the plaintiff was entitled to obtain a decree for eviction on that basis, and

this Court held, that these averments go to show, that in substance the plaintiff has pleaded that the defendant had become a defaulter within the meaning of Section 13(1)(a), which he could become only if the defendant had neither paid nor tendered the amount of rent at least for a period of six months prior to the filing of the suit. This judgment in Narsaram's case has also not been noticed in Phool Chand's case. However, in view of conflict of judgments between Shyam Sunder's case and Phool Chand's case, in Bulaki Das Vs. Laxmi Narain, S.B. Civil Second Appeal No. 317/99, I framed a substantial question of law, and referred the matter to the larger Bench, but then, fortunately or unfortunately, as the things had it, that matter has been dismissed in default on 24.3.2005, and has not been restored so far. The fact also does remain, that the present appeal is of the year 1984, and I do not stand advised to keep the matter pending indefinitely till the reference is decided, if it happens to be restored, more particularly in view of the fact, that the three judgments in Shyam Sunder's case, Phool Chand's case and Narsaram's case are on the question about pleading of default, while in the present case I am concerned with the pleading about subletting, and there are numerous other judgments cited by the learned counsel for the respondent, including those of Hon'ble Supreme Court throwing enough light on the question as to whether these pleadings, as taken, are sufficient or not.

In this regard Virendra Kashinath Ravat's case is a case, where the pleadings taken in the plaint was "The said premises have been unlawfully sublet to the third defendant who is at present in unlawful occupation of the said premises.....". It was also pleaded by amendment "The plaintiffs say that pending the suit the defendants have or any of them has inducted in the suit premises Defendant Nos. 4 and 5 unlawfully". Learned Single Judge had treated the aforesaid pleading as insufficient to make out a case for subletting. It was noticed by the Hon'ble Supreme Court, that this was not a point considered by or even raised before the two fact finding forums, and Order 6 Rule 5 C.P.C. confers powers on the Court to order a party to make a further statement, or even a better statement, or further and better particulars of any matter already mentioned in the pleading. It was also held that this provision indicates that no suit shall be dismissed, merely on the ground, that more particulars are not stated in the pleading. It was also observed that if the contesting defendant had raised objection that the pleading were scanty perhaps the plaintiff would have further elaborated. Then, the provisions of Order 6 Rule 2 were examined, and it was held, that the object is two fold. First being to afford the other side intimation regarding the particular facts of his case, so that they may be met by the other side, and the other is to enable the court to determine

what is really the issue between the parties. Then, reference was made to the two other judgments of Hon'ble the Supreme Court, being that in Manphul Singh Vs. Surinder Singh reported in AIR 1973 SC-2158, and M/s. Ganesh Trading Co. Vs. Moji Ram reported in AIR 1978 SC-484, and then in para-18 it was held as under:-

"18. We have no doubt that appellant by making the averments in paragraph 5-A in the plaint, as quoted above, afforded sufficient notice to the other side that he was putting forth a case that first respondent was inducted into the premises by the tenant and such induction is unlawful. Appellant could not make further elaboration as to who is the legal heir of the original tenant and hence appellant adopted the cautious approach without committing themselves as to who, among the rival claimants to the legal heir-ship of Ms. Shanta Sabnis is responsible for such unlawful act. We are, therefore, of the clear view that learned Single Judge ought not have disturbed the concurrent findings on such an erroneous consideration."

Thus, in view of this judgment of Hon'ble the Supreme Court, clearly interpreting pleading to be sufficient, I need not detain any more on the reference having been made by me to the larger Bench. Then, in Govind Prasad's case, which again was a case of subletting, the pleading did not contain the averment about "that the suit premises having been let out without permission of the landlord", and the argument was raised, that unless this fact constituting cause of action is pleaded, the suit is liable to be dismissed for non-disclosure of cause of action, and various judgments of Hon'ble the Supreme Court

were cited in support of the contention. The learned Single Judge of this Court examined this contention, and held in para-18 and 19 as under:-

"18....Such fine ingenious legal technical plea may demonstrate good legal skill of expert in legal profession but in this case it is too late. If objection about lack of pleading is accepted at latter stage of suit or at first appellate stage then that will be benefit to those persons who by their conduct have clearly shown that they understood the allegations against them, contested it and they failed in trial Court and thereafter they with the help of law expert (or even by their own study of law) came to know that the pleas which they understood and contested, in fact, were not understood by them.

19. Even if it is choice of the defendant to contest the suit on question of fact or on question of law or on both, question of law and question of fact then the legal plea dependent upon fact cannot be allowed to be raised when not raised in time. This principle is required to be followed with more rigour when not taking of such objection in time deprives other party from correcting pleadings, if permissible by law. The allegation of sub-letting against tenant with claim of decree of eviction of tenant by all its implication is an allegation of landlord that the premises has been sub-let by the tenant without permission of the landlord and cannot be read to mean that the premises has been let-out with the consent of the landlord expressly or impliedly still the landlord is seeking eviction of the tenant on the ground of sub-letting. This Court has no hesitation in holding that in the suit claiming relief of eviction of tenant on the allegation of sub-letting by the tenant without specific mention of the words "without consent of landlord", the plea of "without permission of the landlord" is inherent in it, because of the plain and simple reason that which sub-letting is ground for eviction is given in the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. Some of the facts are inherent, if plea is read with reference to law applicable. "

The learned Single Judge also held that the

contention does not help the appellant in view of several reasons quoted in para-26 as under:-

"26. All the judgments relied upon by the learned counsel for the appellants cannot help to the appellants in view of several reasons like (1) not objecting to the lack of pleading by the defendant in time, (2) the specific issue has been framed by the trial Court incorporating the actual ground of eviction with the phraseology which according to the defendant should have been in the plaint, (3) defendant got full opportunity to contest the allegation of sub-letting during trial and he availed it, (4) no prejudice has been caused to the defendant because not mentioning of exact phraseology as given in the Section, (5) defect, if it was there, it was curable by amending the plaint, (6) if there was defect in pleading, the plaintiff could not cure the defect because the defendant by not raising objection in time and by contesting the issue of sub-letting as issue of fact only persuaded the plaintiff to believe that defendant understood that on proving fact as pleaded, of giving premises on rent to third person by the tenant, the plaintiff will be entitled to decree and (7) the ground was not raised before first appellate Court. Above all is the fact that in present case, the pleading was not defective at all. Therefore, the judgment relied upon by the learned counsel for the appellants have no application to the facts of this case."

Then, in Narayan Lal's case again this Court was considering question of sufficiency of pleading in a suit filed on the ground of reasonable and bonafide necessity, wherein the pleading taken was, that the plaintiff needed suit shop "badly", and it was held that by this the plaintiff clearly intended to convey that the requirement is reasonable and bonafide. It was also considered, that on the pleadings, the issue of reasonable and bonafide necessity was struck, and when the parties led evidence,

the defects if any stood removed. Reference was made to judgment of Hon'ble the Supreme Court in Nagubai Ammal Vs. B. Shama Rao reported in AIR 1956 SC-593, and Siddik Mohammed Shah Vs. Mst. Saran reported in 1930 PC-57, wherein it was held, that "the true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of evidence. But the rule has no application where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto", and following this principle it was held, that the parties went to trial and adduced evidence on the question as to whether the plaintiffs need the suit shop reasonably and bonafide, and thus the contention was negatived. Aforesaid Nagubai's case has also been relied upon by the learned counsel for the respondent.

In my view, thus, the contention, about absence of pleading necessary particulars, and the contention about variance between pleading and proof, or that the facts proved having not been pleaded, could not be considered, cannot be accepted. The above judgments of this Court, and Hon'ble the Supreme Court, clearly rule, that the pleading as contained in para-5 of the plaint is sufficient pleading

to maintain a suit for eviction on the ground of subletting, as provided in Section 13(1)(e). Admittedly no objection was ever raised before the learned courts below, about the pleading being not sufficient, or about the defendant having suffered any prejudice on that count, much less leading of evidence was ever objected, on the ground of absence of pleading. Thus this contention is negatived.

Then, I come to the contention about the learned lower Appellate Court having relied upon Bhagwat Prasad's case, and that having been over ruled in Amir Ahmed's case. So far factual aspect of this contention is concerned, that is a fact, and is to be accepted as such. Learned lower Appellate Court, as appears from impugned judgment, is conscious of the fact, that judgment in Bhagwat Prasad's case is already under reference before Division Bench.

The question then is, as to what is the effect of this, on the aspect of sustainability of the impugned judgment. A look at Bhagwat Prasad's case shows, that in that case the allegations were, that the defendant had sublet the suit shop to Gulab and Ishardas. The learned lower Appellate Court found, that subletting to Gulab and Ishardas as such is not proved, but it was nevertheless established that the defendant had parted with the possession of the property to Gulab and Ishardas, and thereby incurred the liability of eviction. It was

contended that the plaintiff had not come with a case of parting with possession but has set up a case of subletting. Then, it was also argued that Gulab used to sit on the shop in question off and on, for the purpose of doing minor job of a tailor, such as fixing buttons on clothes, and therefore it cannot be said that the defendant had parted with the possession of the shop, and regarding Ishardas also, the contention was, that the shop in question is situated in vegetable market and merely because Ishardas some times used to put a few vegetables in the shop, though he carried his business in front of the shop on the public road, it cannot be said that Ishardas had been given possession of the shop by the defendant, and it was held by the learned Single Judge, that Gulab is just a tailor by name and cannot do the job of a full fledged tailor except fixing buttons etc., and at one stage the defendant stated that Gulab was his servant but later on he did not stick to that stand. Thus, it was held that in order to help Gulab in earning his livelihood the defendant used to allow him to sit at his shop off and on and it was held, that it cannot be said that the defendant had parted with possession to Gulab. Then, regarding Ishardas, it was held, that D.W.5 had stated that Ishardas does the business of 'Arat' in the shop in dispute, and also sells water melons there, and it was considered that if a hawker while selling goods on pavement puts them in a nearby shop at night in a box, and the shop keeper allows him to do so,

either on personal grounds or on humanitarian consideration, it cannot be said that the shop keeper has parted with the possession of the shop in favour of such a hawker, but here the position is quite different. Admittedly the defendant is carrying on tailoring business in the shop in question, and allowing vegetables and fruits in the shop regularly would be nothing short of sharing the shop with the vegetable seller, and thus it was held to be subletting to Ishardas. While the Division Bench in Amir Ahmed's case did hold, that where the tenant allows another person to merely use the premises or part of the premises, he cannot be said to have parted with possession of the premises or part of the premises, so as to entail the liability of eviction. The facts in Amir Ahmed's case were very telling, inasmuch as in that case the allegation was, that the tenant had sublet half portion of the Barsali to one Ramjan, without the consent of the landlord. The tenanted premises were half portion of the Barsali, one kitchen, one latrine, two rooms, chowk and Chabutri on the ground floor, and the learned Single Judge referred the matter to the larger Bench by expressing the opinion, that a distinction has to be drawn between the sharing of the possession of the premises, and parting of possession of the premises, and the correctness of the view taken in Bhagwat Prasad's case was doubted. In those facts, after referring to various judgments, it was held, that where a tenant allows another person to merely use the premises or

part of the premises, he cannot be said to have parted with possession of the premises, and that conversion of exclusive possession of the premises by the tenant into a joint possession of the premises by the tenant and a third person, does not constitute parting with possession.

May be that the learned lower Appellate Court proceeded by relying upon the judgment in Bhagwat Prasad's case, but then, the question required to be considered is, as to whether even on the principles propounded in Amir Ahmed's case, it cannot be said that the tenant had sublet the premises to Trilok Singh. This question obviously I shall be examining in the forthcoming paras.

Then, taking up the other contention, about the findings of the learned lower Appellate Court, not being about the defendant having sublet the premises. Of course, the learned lower Appellate Court has recorded a finding, that the plaintiff has proved that Sant Singh has delivered possession of the premises to sub tenant Trilok Singh without permission of the landlord, and has also held as a conclusion that the plaintiff has been able to prove that the tenant, without permission of the landlord has handed over possession of the entire premises to other person Trilok Singh, or has let it out to other person, or has parted with possession. Of course, the learned lower Appellate Court should have come to a categorical finding

either ways, and should not have recorded such alternative finding, as to whether the defendant has sublet, or possession has been delivered to other person, or premises have been further let out, or the defendant has otherwise parted with possession.

At this place, I may gainfully quote the provisions of Section 13(1)(e) of the act, which read as under:-

"(e)that the tenant has assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord; or"

Thus, a reading of the above provision shows, that where tenant assigns, or sub-lets, or otherwise parts with the possession of, the whole or any part of the premises, without the permission of the landlord, the liability of eviction is attracted. However, the Court was required to come to any categoric conclusion, as to whether the premises have been assigned, or otherwise parted with possession, or sublet. But then since the appeal is at hearing stage, and is appeal of 1984, it would not be appropriate for me, at this stage, after 22 years, to remit the matter back to the learned lower Appellate Court, to record a categoric finding, but instead, in view of the provisions of O. 41 Rule 24 C.P.C., I stand better advised

to decide the controversy on merits, as to whether the plaintiff has proved that the premises have been sublet to Trilok Singh, without permission of the landlord, or as to whether the plaintiff is entitled to the decree for eviction.

Now before proceeding with the adjudication as to whether the defendant has sublet the premises to Trilok Singh, or not, it is required to be considered, as to what are the parameters, and things to be found in order to find premises to have been sublet, or in absence of the particular material, it cannot be said that the premises have been sublet. In this regard I may straightway come to the various judgments cited on either side, and then to deduce therefrom the legal principle, and then proceed to examine the material on record, keeping in view those principles.

In this regard Hazarilal's case relied upon by the learned counsel for the appellant, the Division Bench of Delhi High Court did hold that in sub-letting there should exist the relationship of landlord and tenant as between tenant and his subtenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sublet...". Then, in Resham Singh's case it was held

relying on the previous judgments in *Kala Vs. Madho Parshad Vaidya* reported in (1998) 6 SCC-573 and *Benjamin Premanand Rawade Vs. Anil Joseph Rawade* reported in (1998) 9 SCC-688, that to establish subletting onus is on landlord to prove through evidence that the subtenant was in exclusive possession of the property in question, that there was a relationship of lessee and lessor between the subtenant and tenant, and that the tenant had parted with possession in favour of the sub tenant exclusively. In *Jagan Nath's* case parameters were laid down as to when the act of the tenant would tantamount to parting with possession, and it was held that the expression parting with possession means giving possession to persons other than those to whom possession had been given by the lease. It was held, that user by other person is not parting with possession so long as the tenant retains the legal possession himself. There must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. It is a different aspect, that the facts in that case were, that the tenant father had retired from business and his sons had been looking after the business, and it was considered that if the father was carrying on business with his sons and family was Joint Hindu Family, the father has a right to displace the possession of the occupants i.e. his sons, therefore, it cannot be assumed that father had parted with possession legally to attract the mischief of Section 14(1)

(b) of the Act. Then, in Dipak Banerjee's case ingredients of subletting were laid down, viz. the first ingredient was held that the alleged sub tenant is in exclusive possession of the part of the premises and the tenant retains no control over that part of the premises. The second ingredient has been held is that the right to occupy the premises must be in lieu of payment of some compensation or rent. In Delhi Stationers's case it was held that subletting means transfer of an exclusive right to enjoy the property in favour of the third party, and the said right must be in lieu of payment of some compensation or rent. Parting with of the legal possession means possession with the right to include and also a right to exclude others, and mere occupation is not sufficient to infer either sub-tenancy or parting with possession. Then, in Benjamin Premanand's case again it was held, that with a view to establish sub tenancy, the two essential conditions, which were required to be satisfied by him through evidence were, that the appellant was in an exclusive possession of the property in question, and that between the appellant and the chief tenant there was a relationship of lessee and lessor. In Dev Kumar's case again it was held, that the conclusion on the question of sub letting is question of law derived from the findings on the materials on record, as to the transfer of exclusive possession, and as to the said transfer of possession being for consideration. The burden of making a case of sub-

letting is on the landlord/landlady. Likewise in Hardev's case it was held by this Court, that mere looking after the business on the premises by his mother and his brother's wife, who are his heirs and also members of Joint Hindu Family, does not amount to parting with possession, as for making out a case of parting with possession, the possession must be exclusive, for consideration, leading to an inference of pecuniary benefit.

Thus, the principle propounded in all these judgments, as relied upon by the learned counsel for the appellant is, that for making out the case of subletting, three ingredients must be there, viz. that there should be transfer of exclusive right to enjoy the property, such right must have been given in lieu of payment of some consideration or rent, and the parting with possession should be of legal possession, being the right to include so also right to exclude others, and not mere occupation.

So far as the cases cited by the learned counsel for the respondent are concerned, a bare reading of them, as briefly recapitulated in foregoing paragraphs does show, that in those cases on various factual aspects being found on record, the conclusion of subletting has been drawn, but then so far as the principle propounded in various cases cited by the learned counsel for the appellant are concerned, no otherwise view has been taken. Obviously,

therefore, I have to proceed on the basis, that for making out the case of subletting, three ingredients must be there, viz. that there should be transfer of exclusive right to enjoy the property, such right must have been given in lieu of payment of some consideration or rent, and the parting with possession should be of legal possession, being the right to include so also right to exclude others, and not mere occupation.

Before, I proceed to examine the record, I may also consider one more aspect of the argument of the learned counsel for the appellant, on the authority of judgment of Hon'ble the Supreme Court in T.K. Lathika's case. The argument is, that admittedly Jagan Singh was the tenant in the premises since before purchase of the property the plaintiff's ancestor, and it is contended that Jagan Singh is continuing to carry on business in the premises, and along with him some times Sant Singh was carrying on business, some times Trilok Singh was carrying on business, and some times other son was carrying on business, and that merely because fresh rent note was got executed from Sant Singh, the tenancy of Jagan Singh does not come to an end, and since Jagan Singh is carrying on business in the shop no case of subletting is made out. I may refer to the judgment in T.K. Lathika's case. In that case the facts are, that the property was originally leased to the respondent tenant in 1956. Then, on 2.8.1980 the

original owner executed a gift deed in favour of his daughter, the appellant. Then, on 1.7.1981 the appellant filed a petition for eviction under Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965, regardless of the third proviso to Section 11(3), which prescribed that a landlord whose right to recover possession arose under an instrument of transfer inter vivos, would be entitled to apply for such possession, only after the expiry of one year from the date of the instrument, and the contention of the landlord was, that this moratorium period did not apply to her, as the tenant had executed a fresh lease in her favour on 18.8.1980, accepting this reasoning, the Rent Controller granted decree for eviction, which was set aside by the Appellate Authority, the revision was dismissed, and the Court held that moratorium would not be applicable, and the appeal was dismissed. On those facts the appeal of the landlord was also dismissed. It was in these facts that a question was posed, as to whether the appellant's right to recover possession arose, under the gift deed, or under the new agreement dt. 18.8.1980, and the contention of the learned counsel for the appellant was noticed, to the effect, that lease came to an end when new lease agreement was executed, and that there was implied surrender of the old lease when the new lease deed was executed. It was noticed, that admittedly the tenant continues to be in possession of the building in the same manner as before, and the building

also remains the same, and in para-12 it was held as under:-

"12. The principle which governs the doctrine of implied surrender of a lease is that when a certain relationship existed between two parties in respect of a subject-matter and a new relationship has come into existence regarding the same subject-matter, the two sets cannot coexist, being inconsistent and incompatible between each other i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not ipso facto amount to implied surrender. It has to be ascertained on the terms of the new relationship vis-à-vis the erstwhile demise and then judged whether there was termination of the old jural relationship by implication"
(Emphasis supplied)

Then, in para-17 it was held, that the right of the landlord to recover possession would then arise under that instrument of lease, which would also be a transfer inter vivos, as envisaged in the third proviso. In other words, the question was, as to whether the landlord's right to recover possession should be taken to arise from gift deed or from the new lease deed, and considering the case from other stand point it was held, that the suit was filed before expiry of one year. This is one aspect of the matter. The other aspect of the matter is, that as held in para-12, the implied surrender comes only when the new relationship comes into existence regarding same subject matter, and the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the

former, then it would be deemed to have been terminated in order to enable the latter to operate. In the present case it is deposed by Jagan Singh D.W.2, that the rent was increased from time to time upto Rs. 25/-, thereafter shutter was installed and staircase was removed and the rent was increased to Rs. 60/-. At that time the landlord wanted the rent note to be executed in the name of Sant Singh, to which he opposed, but then the landlord said that either rent note in different name should be executed or he should vacate the shop, and since the business was to be carried on, the rent note in other name was executed. Then, in the pleading of the parties, being in para-2 of the plaint, it was clearly pleaded that the shop was taken on rent by the defendant for carrying on his own business on 1.8.1969, and in reply all that has been pleaded is, that the defendant's father Jagan Singh had taken the premises on rent for carrying on his own and sons' business in 1950. Then Mangha Ram after purchase increased the rent on the threat of eviction. Thus, the defendant and his father were carrying on business in the suit shop, and are carrying on business. Then, in additional pleas also it was pleaded that Jagan Singh, the defendant and his brother have been carrying on business in 1950. Thus the execution of the rent note has not been denied, and as is clear from the statement of D.W.2, that on the threatening to evict from the premises rent note was executed in the name of his son. Jagan Singh has also admitted, that the name of his shop

was Sardar Electric Store, and that after execution of fresh rent note the name of the shop was changed in the name of Sant Singh, being Sardar Radio Service. Then, he has also deposed that when rent note was executed by Sant Singh and Mangha Ram, he was also present. In my view, this material is sufficient to conclude, that Jagan Singh surrendered his tenancy, and a fresh tenancy was created in favour of Sant Singh with the execution of Ex.-1, which was executed by Sant Singh in his presence. Thus, the principle propounded in T.K. Lathika's case as sought to be invoked by the learned counsel for the appellant, does not help him, and in my view, help the defendant.

Then it is also significant to note, that it is clear from the collective reading of the statement of D.W.1 Sant Singh, D.W.2 Jagan Singh, and D.W. 4 Gurbachan Singh, that Sant Singh and his sons are living separately at different place in Jodhpur. They are carrying on their different business, and are not in common commensality. They do not constitute joint Hindu Family. Thus, in my view, the contention of the learned counsel for the appellant cannot be accepted, that Jagan Singh continued to be tenant in the suit shop, so as to entitle any of defendant's brother, and/or Jagan Singh, to continue business in the shop, rather it is established, that tenancy of Jagan Singh came to an end with commencement of tenancy in favour of Sant Singh, under rent note Ex.-1, and

since then Sant Singh alone remained as tenant in the premises.

It is significant to note that out of the rent receipts produced by the defendant, all of them, as are in the name of Jagan Singh, are for the period prior to execution of Ex.-1, and not a single receipt in the name of Jagan Singh, for the subsequent period has been shown by the learned counsel for the appellant. Thus it cannot be accepted that there was no implied surrender.

Now I proceed to examine the material on record, keeping in view the principles propounded in various judgments of Hon'ble the Supreme Court, as found above, to decide in the present case, as to whether subletting is established on record or not, and whether the plaintiff is entitled to have the decree upheld or not.

Coming to the evidence, the evidence of P.W.1 is that the shop was let out to Sant Singh at the rent of Rs. 80/- per month under rent note Ex.-1, and since 1.8.1973 Trilok Singh sits on the shop, as Sant Singh has sublet it to Trilok Singh. He has also deposed that Trilok Singh came to pay rent in 1974, and on asking him he informed that his brother has sublet to him. Thereupon he met Sant Singh, who had taken a separate shop in Minerva Building, and Sant Singh gave out, that he has given over the shop to Trilok

Singh, and the plaintiff should receive rent from him. He has deposed that at that time he took Mohd. Khan with him. Thereafter the plaintiffs stopped taking rent from Sant Singh and did not receive rent from Trilok Singh. He has also deposed that no permission was given to Sant Singh to give the shop to Trilok Singh. According to him Sant Singh's shop is in the name of Light and Radio Service, while on the suit shop Trilok Singh carries on business, in the name of Sardar Radio Service, and he has got changed the shop in his name since 1.8.1973. He has also deposed that business of Sant Singh and Trilok Singh is separate, the two have their own separate business, and they are living separately. Then, this witness was cross-examined at length, and has deposed that he does not know as to since when the shop was with Sant Singh. He has also deposed in cross examination that since before subletting, Trilok Singh and Sant Singh are carrying on business separately and are living separately. He has of course deposed that he does not know as to whether Trilok Singh pays rent to Sant Singh or not, nor does he know as to how much. He has also deposed that he does not know as to how many brother of Trilok Singh sit on the suit shop, and how many sit on the shop of Sant Singh. He of course denied to be knowing Jagan Singh, but he has deposed that he has not seen him sitting on the shop at the time of his father, rather he had been sitting on the shop since 1973. Then, he has deposed that he does not remember as to whether the rent was received by

his father from Jagan Singh, but then after death of his father he had not received rent. When he was confronted with certain receipts, he admitted signatures thereon to be of his father and of Munim etc. The witness was sought to be re-examined but question was not allowed. Thus, this witness has clearly deposed, that the shop was let out to Sant Singh, the father and the sons are living separately, and are having separate business, and that Sant Singh carries on business in Minerva Building, while Trilok Singh carries on business in the suit shop, and Trilok Singh has got the shop entered in his own name, and has further deposed, that Sant Singh told him to receive rent from Trilok Singh, and on this precise aspect, there is no cross examination whatever. Significantly he has not been put any question, about the shop having not been sublet, nor has he even been suggested, that Sant Singh retains any control or legal possession over the shop in question, or that Sant Singh ever comes on the shop. Then, P.W.2 has proved the rent note to be in his handwriting. Since he is not a witness of subletting, I need not detain much. Then P.W.3, another tenant of the plaintiff, has deposed that Trilok Singh carries on business in the shop Sardar Radio Service (suit shop) which is adjacent to his shop, and Sant Singh had another shop at Sojati Gate. In cross-examination he has deposed that Jagan Singh also sits on the suit shop, and has maintained that he has never seen Sant Singh coming on the suit shop. This witness has deposed about Trilok

Singh alone carrying on business in the suit shop, and Sant Singh to be carrying on business at a different place, in a different shop. Then, P.W. 4 has deposed the shop to have been let out to Sant Singh, whereon earlier Sant Singh was sitting, but now Trilok Singh sits on the shop, and Sant Singh sits on the shop near Minerva Cinema on Radio Shop which is shop is of Sant Singh, while the suit shop was taken on rent by Sant Singh, who had given it over to his brother and sublet it. He has also deposed that Sant Singh and Trilok Singh live separately, and carry on business separately. In cross examination he has deposed that father and sons had separated 4-4 ½ years ago. Then, he has deposed about separation of both the sons Sant Singh and Trilok Singh. He has also maintained that Sant Singh told him that he has taken another shop, and has given over this shop to his brother. He deposed to be knowing about their separation. He has also deposed that when the shop was purchased by Mangha Ram from Kavirajji at that time Jagan Singh was sitting on the shop, thereafter it was given to Sant Singh, and now Trilok Singh alone carries on business. He has of course deposed that Trilok Singh gave him out that he pays rent to Sant Singh and Sant Singh pays rent to the landlord. He has also maintained that on the Minerva shop, Sant Singh alone sits, and on the suit shop Trilok Singh alone sits, and some times his younger brother also sits. Thus this witness has deposed that two brothers are separate, and their mess and business are separate, earlier

Sant Singh was carrying on business in the suit shop, who has given it over to Trilok Singh, but significantly he has not been suggested anything about the nature of possession of Trilok Singh being that of anything less than exclusive possession, or about Sant Singh retaining any type of control regarding possession, over the suit shop. Then, comes P.W.5 Mohd. Khan, who is a neighbour of the suit shop, and is attesting witness of rent note Ex.-1, and has deposed that Trilok Singh sits on the shop since 3-4 months prior to Diwali of 1973, and Sant Singh told that he has started new shop near Minerva and the suit shop has been let out to Trilok Singh, and that Trilok Singh gave him out that the suit shop has been given out to him by his brother. He has also deposed that he went to Sant Singh's shop along with the plaintiff, and Sant Singh gave out, that the plaintiff should receive rent from Trilok Singh, who had gone to pay rent which was not accepted by the plaintiff. Then, he was cross-examined, and he has maintained that he did not see Sant Singh and Trilok Singh both sitting on the Minerva Shop, rather he has seen the business to be separate, and has maintained that Sant Singh gave out that he has established his younger brother in the suit shop. He has also deposed Trilok Singh gave out that brothers have separated. Then, the plaintiff has also examined P.W.6 Anand Bihari Lal who was an Inspector in the Labour Department, and had appeared with record maintained under Shops and Establishment Act, and proved various

documents including Ex. 4, 5, 6 and 7, which clearly show that the suit shop is registered in the name of Trilok Singh, and from Ex. 7 it is clear that the shop of Minerva in the name and style of Light and Radio Service is in the name of Sant Singh. This witness was cross-examined but he could not be shattered in cross examination. Then, P.W.7 Hero Kurani is one of the co-plaintiffs. He has also deposed that the shop was let out to Sant Singh, who had let it out to Trilok Singh, without their permission. In cross-examination he has deposed that the two are brothers; Sant Singh was carrying on Radio work in the shop, and now Trilok Singh alone is sitting on the suit shop.

In my view, thus from the evidence of the plaintiff as catalogued above, it is clearly established, that the suit shop was let out to Sant Singh defendant appellant, and he has shifted his business to other shop near Minerva and has given over the suit shop to his brother Trilok Singh. The business in the two shops is carried on in different names, and under the statutory requirements, like Shops and Commercial Establishment Act, the suit shop has been got registered in the name of Trilok Singh, while the shop at Minerva is registered in the name of Sant Singh. It is also established from the evidence that the two brothers are living separately, and they have separate business, one having nothing to do with each other. With this, as noticed above, it is not the

suggestion to any of the plaintiff's witness, that the shop has not been sublet to Trilok Singh, or is not in his exclusive possession, or that Sant Singh is retaining any type of legal possession, or even any type of control over the suit shop. Of course, the evidence does not establish positively that any rent is being paid by Trilok Singh to Sant Singh, but then this much is clear from the evidence, rather established, that Sant Singh gave out to the plaintiff, that Trilok Singh will pay rent to the plaintiff, and the plaintiff should receive it from Trilok Singh, and on this aspect there is no cross-examination. Thus, it is clear that Sant Singh has given over legal possession of the shop exclusively i.e. to the exclusion of Sant Singh as the registration of the shop has been got changed from that of Sant Singh to that of Trilok Singh which is a million dollar circumstance about exclusive possession to the exclusion of Sant Singh. Thus, it cannot be said to be a case where the alleged sub tenant is merely occupying the premises, without any exclusive right to enjoy the property having been conferred on him by Sant Singh. Thus, in my view, except that there is no conclusive evidence on the side of the plaintiff about any agreement to pay rent, or with consideration by Trilok Singh, the other ingredients of subletting are clearly established from the evidence of the plaintiff, and regarding payment of rent this much has been shown, that Sant Singh desired and conveyed to the plaintiff, that the plaintiff should

receive rent from Trilok Singh, who would continue to pay it to him.

I shall now discuss the evidence led on the side of the defendant, to find as to, to what extent the defence has been able to demolish the case of the plaintiff, and/or to substantiate its own case. So far as D.W.1 Sant Singh, the defendant appellant is concerned, all that has been stated by him is, that the suit shop was taken on rent by his father from Kavirajji at the time of partition of India and Pakistan and since then the shop is continuing on rent, and at that time the witness was student of first standard. Then, he has stated that earlier rent was Rs. 10/-, and the last rent was Rs. 80/-. He has also deposed that Mangha Ram had told, that he would construct the shop at the place of staircase, and at that time the rent was increased to Rs. 80/-. Then, he has deposed that the plaintiff has received rent upto 1972 or 1973 and thereafter has not received on the pretext that rent should be increased. Then, he has proved certain receipts being Ex. A-3 to A-15. Then, he has deposed that he and his father lived in the same house at Paota A road. However, now he lives in Shashtri Nagar as the house in Paota was falling short. Then, he has deposed about standard rent, and has deposed that his all other brothers are working on the suit shop. This is whole evidence of the defendant, on the aspect of subletting, or its denial. Then, in cross-examination he has deposed that

Trilok Singh is his brother who was sitting on the suit shop upto one year before, and now he is living in Jaipur temporarily, but then he would return and sit on the shop. Then, he has admitted his signatures C to D on Ex.1. Then, he has admitted that in Shops and Commercial Establishment his brother's name was entered, and has admitted signatures A to B on Ex.-4, and signatures C to D on the back of Ex.-4 to be of his brother Trilok Singh. Then, he has admitted signature A to B on Ex. -5 to be of Trilok Singh. Then, he admitted that near Minerva Cinema he has a shop in the name and style Light and Radio Service on which he works since 1974. At this place he has voluntarily deposed, that he sits on suit shop as well. It may be observed here even at the cost of repetition, that it had never been the case of the defendant in the evidence or in cross examination to the plaintiff's witness, that the defendant also sits on the suit shop. Then, he has admitted that in 1973 he had submitted the form for registration of his shop in the name of Light and Radio Service, showing himself to be the owner, and has also given form of Income Tax and Sales Tax, the sales tax form of Light and Radio Service is in his name. Then, he has admitted his signatures A to B and C to D on rent note executed in favour of the plaintiff. Then, he has deposed about receipts of electricity charges being with his father, and he does not know as to when it was last paid. Then, he has stated that after filing of the suit his father is authorised to pay rent and electricity

charges, and he does not know as to whether any amount is outstanding in this regard. Then, he has deposed that Trilok Singh is sitting with his permission, and he does not know about profit and loss of the shop for the last six years. This is the entire statement of the defendant Sant Singh. Suffice it to say, that the defendant even by his word of mouth has not deposed as to how the shop is not in exclusive possession of Trilok Singh, or as to how he is retaining possession/legal possession, or any control over the shop in question. Then, comes the evidence of D.W.2. He also has deposed to have taken shop on rent in 1950, having four sons and rent having been increased after purchase by Mangha Ram. Then, he has proved receipts about payment of rent. Then he has deposed that when the rent was increased to Rs. 60/- the plaintiff asked him to get the rent note executed in the name of Sant Sangh, and on Jagan Singh offering not to do it the plaintiff asked to vacate the shop, and since business was to be carried rent note was executed, and that thereafter the plaintiff never talked to him, but talked to Sant Singh only. Then, he has deposed that on the shop, Gurbachan Singh and Gurmukh Singh sit, while Sant Singh carries on shop near Minerva in the name of Light and Radio Service, and Trilok Singh has gone to Jaipur, and Chhatar Singh works as freelancer. Then, he has deposed that the name of the shop was earlier Sardar Electric Store, and when the fresh rent note was executed its name was changed to Sardar Radio Service. Then, he has

deposed that shop has not been sublet, and rent is being deposited in the Court. This witness is cross examined wherein he had admitted that Sant Singh had agreed to pay rent at the rate of Rs. 80/- per month, and at that time he did not ask the witness either. Then, he has stated that it is correct that rent from 31.7.73 to 16.9.79 was not paid as the plaintiff did not receive the rent, and even the money order was declined to be received. He has denied the suggestion about Santok Singh having let out the shop to Trilok Singh. He admitted the signature of Santok Singh on the rent note. Then, he has deposed that at the time when the rent note was executed he was present, and it was executed in his presence. Then, he has also admitted various signatures on Ex.-4. He has deposed that earlier Trilok Singh was sitting on the suit shop, and some times on Minerva shop, however, he has gone to Jaipur and is visiting off and on. He has also deposed that at the time of filing of the suit Trilok Singh was doing business with him at Jodhpur. Then, he has admitted that Santok Singh and Trilok Singh both are living separate from him, and Santok Singh and Trilok Singh interse are also living separately. Then, he has deposed that for the last 6-7 years Santok Singh is never sitting on the suit shop, and is sitting on the Minerva shop only, and that he is sitting on the shop of Light and Radio Service. This is the whole evidence of Jagan Singh, it would suffice to observe, that admittedly both the sons are separate from Jagan Singh, and also

interse, both are having separate business, and admittedly Sant Singh has never come on the suit shop during period in question, and Sant Singh is the sole owner of Minerva shop Light and Radio Service, and that Trilok Singh and Jagan Singh were carrying on business in the suit shop. He has also admitted registration under Shops and Commercial Establishment to be in the name of Trilok Singh. In my view, these circumstances sufficiently show, that it is not in dispute, that two brothers are carrying on their independent business one having no control over the other, and the defendant is carrying on business as sole proprietor, and it is not shown that he has any interest in the business being carried in the suit premises. Thus, it can be said that Trilok Singh is in exclusive possession of the suit shop, having been so put by the defendant Sant Singh. Then, D.W.3 is the neighbour. He is a witness mainly for the purpose of standard rent, and has not been produced to controvert the subletting. Then, the last witness is P.W.4 Gurbachan Singh another brother of defendant Sant Singh. He has deposed that he and his brother Gurbachan Singh and Chatar Singh are carrying on business in the suit shop, and sometimes father also comes. Then, he has deposed that electricity charges are paid by his father and Sant Singh to Mangha Ram's sons. It may be observed that it is nobody's case. It is neither deposed by Sant Singh or by Jagan Singh. Then, in cross examination he has deposed that Sant Singh is carrying on business near Minerva, in the

name and style of Light and Radio Service. Earlier Trilok Singh was carrying on the work of radio, now he is at Jaipur. Then, he has deposed that it is wrong to contend that Santok Singh has sublet the suit shop to Trilok Singh, rather all the brother sit together. This is the whole evidence of defence. In my view from this evidence also it cannot be said, that the defendant has been able to even indicate to be having any sort of possession or control over the suit shop, or to have not given exclusive possession to his brother Trilok Singh, who may now have left.

Thus, in my view, from an over all appreciation of evidence of both the parties, there is no escape from the conclusion that the defendant Sant Singh has assigned the suit shop to his brother Trilok Singh, and has parted with exclusive possession of the suit shop in his favour, and he has nothing to do with the suit shop, and has no type of possession or control over it.

The question then is as to whether from this it can be said that the defendant has sublet the premises to Trilok Singh.

In this regard reverting back to the cases as observed above, that for subletting one of the requirement is the right must have been given to the alleged sub-tenant

in lieu of payment of some consideration or rent. So far as the cases cited by the learned counsel for the respondent are concerned, Shersingh's case is a case directly on the facts, where the shop was let out to father Sher Singh, and it was not proved that father and son were constituting Joint Hindu Family, and rather the son Shiv Kumar was carrying on business in the suit shop, and Sher Singh was sitting on different shop in another locality. On those facts, after considering some previous judgments of that Court, and also following the judgment in Bharat Sales Ltd.'s case, where it has been held that subletting cannot be proved by direct evidence, and court can draw inference upon facts proved at the trial, including delivery of possession, to infer, that premises have been sublet, and interalia on that basis it was concluded that the defendant had sublet the premises to his son Shiv Kumar. Then, in Rajinder Singh's case also the allegation was of subletting the shop by father to son, son was found to be in exclusive possession, and business was not joint, and on those facts it was held, that the premises are in exclusive possession of the subtenant, meaning thereby that the defendant has abandoned his right of possession in the demised premises in favour of subtenant, and it was found that it not possible to get direct evidence regarding subletting. It must be that the tenant was charging some rent from the subtenant, and thus it was held that subletting is established. Then, in Damodar Pai's case also the

possession was given to brother, like the one in the present case, and relying upon some previous judgments of that High Court, so also relying upon the judgment of Hon'ble the Supreme Court, in Bharat Sales Ltd.'s case, it was found, that the defendant is not at all in possession, and rather the subtenant is admittedly in possession, and it was held that there is a clandestine agreement between the first defendant and subtenant, because of which the former had parted with possession to the subtenant, and therefore, it was found to be a case of subletting. Then, relying upon judgment of Hon'ble the Supreme Court in S.A. Vengadamma Vs. Jitendra P.Vora's case reported in (1997) 11 SCC-34 it was held, that brother cannot be legal heir, and he has only been placed in occupation by the tenant and therefore, he is not a tenant at all and is a clear case of subletting. Then, Resham Singh's case was also considered, and it was found that the case of subletting was made out. Then, in M.V. Swami's case, from the circumstances of existence of sign board of type writing institute, and the license being standing in the name of wife of subtenant, it was found that subletting is proved. Then, in Sushma Malhotra's case the subtenant had obtained State and Central Sales Tax Certificate after giving the place of business to be the address of the demised premises. It was found that subletting is proved. Then, in Krishanchand Kapur's case it was held by this Court, that more often than not, it is difficult for a landlord to give direct

evidence of sub-tenancy between a tenant and in chief and the alleged sub-tenant, because this is matter specially within the knowledge of the tenant in chief and the alleged sub-tenant, and that is why the legislature has provided this presumption.

In my view, so far as the judgments of Punjab and Haryana, Kerala and Madras High Courts are concerned, they have not gone on the aspect of their being any relationship of landlord, and tenant between the tenant and the subtenant, and from the circumstances they presumed to be case of subletting including Bharat Sales Ltd., Krishanchand Kapur's case and Rajinder Singh's case. They have proceeded on the basis, that it is difficult for the landlord to give direct evidence of subletting, as it is clandestine deal between the two, to which the landlord is not a party, and thus they were assumed to be the cases of subletting.

So far as the case in hand is concerned, of course, the plaintiff has not led any direct evidence as to what amount is being charged by the tenant from the subtenant, but then D.W.4 does say that they are paying the electricity charges to Sant Singh, who was paying it to sons of Mangha Ram. Likewise it is not the case that Sant Singh was paying rent from his own pocket, and allowing Trilok Singh to do business in the suit shop gratis, as

were cases in some of the cases cited by the learned counsel for the appellant, including Delhi Stationer's case, Hazarilal's case, Dipak Banerjee's case, rather this much evidence has come on record, that the defendant told the plaintiff to receive the rent from Trilok Singh. Thus, the consideration, viz. the rent was to proceed from subtenant, obviously to the landlord, either through Sant Singh or directly, does very much exist. It is not the principle propounded that the tenant in chief should be deriving some element of profit from the venture of subletting. In that view of the matter the intention of the parties (tenant and sub-tenant) to relieve the tenant of the financial liability of rent and/or the electricity charges, can very well be taken to be the consideration, for the sub-tenant to have been inducted into possession.

In view of the above, I would not be wrong if I conclude a case of subletting to have been made out in the present case. However, maintaining my conclusions about subletting having been made out, in the alternative, I may also consider, that even if it is assumed that the existence of some consideration for induction of sub-tenant, is not established, then what is the consequence.

In this regard I may proceed with recalling the basic legal principle, which is well established, that if the plaintiff lays a particular claim, and fails to

establish the entire claim, or fails to establish some part of the claim, even in that event, the plaintiff is not to be non suited whole hog, but he may be granted such relief as he may be entitled, on the basis of the facts proved, less than those pleaded in the plaint, obviously not more than those pleaded. With this principle in mind, I may now revert back to the above definition, contained in Section 13(1) (e), wherein subletting, assignment or otherwise parting with possession, is a ground of eviction. Even according to the learned counsel for the appellant, and as found above, parting with possession and/or assignment, are necessary constituents of the ground of subletting, inasmuch as apart from these two, the additional requirement is about the existence of some consideration for induction of sub-tenant. In that view of the matter, if out of the three requirement to be constituting subletting, even if the plaintiff is assumed to have failed to prove one requirement, being about existence of some consideration for induction of sub-tenant, still the other two ingredients are clearly established beyond doubt, and thus, even the lesser facts proved by the plaintiff, do also entitle the plaintiff to a decree for eviction, on the ground enumerated in Section 13(1) (e) of the Act.

The net out come of the above discussion is that the plaintiff has clearly proved, that the defendant has sublet the shop to Trilok Singh, and for the sake of

argument even if it were to be considered, that the plaintiff has failed to prove existence of some consideration for induction of sub-tenant, even then, in view of other proved ingredients, viz. the defendant having assigned the suit shop to Trilok Singh, and having parted with its possession exclusively in his favour also, the appellant is liable to be evicted under Section 13(1)(e). The substantial question of law as framed is accordingly answered.

No other point was argued.

The appeal thus has no force and is dismissed.

However, at the request of the learned counsel for the appellant, the appellant is given one year's time to vacate the suit premises on the condition that the defendant gives an undertaking before the learned trial court within one month from today that on or before the expiry of the above period, he will peacefully hand over the vacant possession of the suit premises to the plaintiff and that during this period, he will not, in any manner, transfer the possession of the suit premises to anybody. Likewise, the entire decretal amount, so also all arrears of rent, if any, shall be deposited by the appellant in the trial court within one month from today and shall further continue to deposit amount equal to the monthly rent by way

of damages for use and occupation by 15th of each succeeding month, till the actual delivery of possession. In case the appellant fails to comply with any of the above conditions, the respondent will become automatically entitled to execute the decree forthwith.

(N.P.GUPTA), J.